## United States Government National Labor Relations Board OFFICE OF THE GENERAL COUNSEL

## Advice Memorandum

DATE: December 13, 2001

TO : James S. Scott, Regional Director

Veronica I. Clements, Regional Attorney

Bruce I. Friend, Assistant to the Regional Director

Region 32

FROM : Barry J. Kearney, Associate General Counsel

Division of Advice

SUBJECT: EAH/UCSC Inn

Case 32-CA-19149-1 512-5012-0133-5000

512-5012-6737

This case was submitted for advice as to whether the Employer's maintenance of work rules regarding confidentiality and communication with the media violates Section 8(a) (1) in light of <u>Lafayette Park Hotel</u>, <sup>1</sup> and, if so, what is the scope of the remedy.

The Employer became a successor employer at a student housing facility in September 2001. The Employer has distributed an employee handbook at approximately 60 other facilities it operates. The Employer has not distributed the handbook, or applied the provisions at issue, at the instant facility. The two provisions at issue are in the 36-page handbook's "Standards of Performance" section:

Subsection G. Confidential and Proprietary Information

In your position, you may have access to information of a confidential nature regarding residents of the property or other employees. This could include financial as well as personal information. It is your responsibility to respect the confidential nature of this information by safeguarding it when in use, filing it properly when not being used, and discussing it only with those who have a legitimate business need to know.

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<sup>1 326</sup> NLRB 824 (1998), enfd. 203 F.3d 52 (D.C. Cir. 1999).

Subsection P. Communication with Press or Media

There may be a time when you are contacted by the press or other media with questions relating to the Company. Any such call should be referred to the appropriate Director without comment.

We agree with the Region that complaint should issue, absent settlement, alleging that the Employer violated Section 8(a)(1) of the Act by maintaining the two handbook provisions.

There is no evidence that either of the rules at issue were promulgated or enforced discriminatorily. However, as the Board stated in Lafayette Park, above:

In determining whether the mere maintenance of rules such as those at issue here violates Section 8(a)(1) of the Act, the appropriate inquiry is whether the rules would reasonably tend to chill employees in their exercise of Section 7 rights. Where the rules are likely to have a chilling effect on Section 7 rights, the Board may conclude that their maintenance is an unfair labor practice, even absent enforcement.<sup>2</sup>

In Lafayette Park Hotel, the Board held that the employer's rule prohibiting disclosure of "Hotel-private information" was lawful, because it was reasonably addressed to protecting proprietary information and did not implicate employee Section 7 rights. In Flamingo Hilton-Laughlin, however, the Board distinguished Lafayette Park and held that the employer's "code of conduct," providing that "[e]mployees will not reveal confidential information regarding our customers, fellow employees, or Hotel business," was unlawful to the extent that it prohibited employees from revealing information about "fellow employees."

Here, "information of a confidential nature regarding ... other employees" is undefined and therefore unlimited, and could reasonably be read to include information about

 $<sup>^{2}</sup>$  326 NLRB at 825, citations omitted (emphasis added).

 $<sup>^{3}</sup>$  Id. at 826.

<sup>&</sup>lt;sup>4</sup> 330 NLRB No. 34 (1999).

<sup>&</sup>lt;sup>5</sup> Id., slip op. at 2, n.3, 6 (1999).

hours, wages, or working conditions. Further, the prohibition against discussion of such information except "with those who have a legitimate business need to know" could reasonably be expected to restrain employees from discussing such information with union organizers or NLRB investigators. Thus, we agree with the Region that the first paragraph of Subsection G is unlawfully overbroad and complaint should issue, absent settlement.

We further agree with the Region that the rule regarding communication with the press or other media is unlawfully overbroad, as it would prohibit protected employee communication in response to media inquiries. There is nothing to support the Employer's contention that the rule applies only to supervisory and management personnel.

<sup>&</sup>lt;sup>6</sup> The Employer asserts that the rule is not unlawful because the preface "In your position" would limit its application to situations where employees would have access to information only because of a position as, for example, a payroll clerk. However, the rule's reference to "personal" information is also broad enough to apply to for example, employee directories or staffing schedules, which any employee would have access to.

<sup>&</sup>lt;sup>7</sup> See <u>University Medical Center</u>, 335 NLRB No. 87, slip op. at 5 (2001) (broadly stated rule prohibiting employees from discussing confidential information concerning employees unlawful); <u>Pontiac Osteopathic Hospital</u>, 284 NLRB 442, 466 (1987) (confidentiality policy that prohibited discussion of employee problems unlawful); <u>Certified Grocers</u>, 276 NLRB 133, 138 (1985) enf. denied 806 F.2d 744 (7th Cir. 1986) (employer's threats to discipline employees for disclosing employee information, including names, addresses, and wage information, unlawful). Compare <u>Ark Las Vegas Restaurant Corp.</u>, 335 NLRB No. 97, slip op. at 1 n.2, 8-9 (2001) (rule restricting disclosure of information about the company or its clients lawful); <u>Super K-Mart</u>, 330 NLRB No. 29, slip op. at 1 (1999) (rule lawfully prohibited disclosure of company business and documents without prohibiting discussion of wages or working conditions).

<sup>8</sup> See <u>Kinder-Care Learning Centers</u>, 299 NLRB 1171, n. 10 (1990) (employee communications with reporters about working conditions protected) (citing <u>Auto Workers Local 980</u>, 280 NLRB 1378 (1986), enfd. 819 F.2d 1134 (3d Cir. 1987). Compare <u>AT&T Broadband & Internet Services</u>, Case 12-CA-21220, Advice Memorandum dated November 6, 2001, at 10 (lawful rule requiring response regarding business-related matters to media only through designated spokespersons; not a blanket prohibition against employee contact with media).

[FOIA Exemption 5

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<sup>9</sup> [FOIA Exemption 5

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